



TC08192

INCOME TAX – Schedule 55 Finance Act 2009 – fixed penalty for failure to file a CIS return on time – whether taxpayer had a reasonable excuse for his default – appeal dismissed. Application for leave to appeal out of time – dismissed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2020/04082

BETWEEN

PAUL AVERILL

Appellant

-and-

**THE COMMISSIONERS FOR
HER MAJESTY’S REVENUE AND CUSTOMS**

Respondents

TRIBUNAL: JUDGE ABIGAIL HUDSON

The Tribunal determined the appeal on 28 June 2021 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 20 October 2020 (with enclosures), and HMRC’s Statement of Case (with enclosures) dated 13 January 2021.

DECISION

Introduction

1. This is an appeal by Paul Averill ('the Appellant') against a penalty of £100 imposed by the Respondents ('HMRC') under Paragraph 8 of Schedule 55 Finance Act 2009, for a failure to file a Contractor's monthly ('CIS') return for the tax period ending 5 May 2017 on time.

Background

2. The Construction Industry Scheme provides for certain payments made under constructions contracts by a contractor to a subcontractor to be made under deduction on account of income tax. Subcontractors who are registered for gross payment may receive payment without deduction.

3. HMRC require contractors to submit periodic returns (section 70 FA 2004), and may charge penalties to contractors who fail to meet the statutory deadlines.

4. The Appellant was required to submit a return under Regulation 4(1) of The Income Tax (CIS) Regulations 2005 by the 19th of each calendar month.

5. Paragraph 1 of Schedule 55 to FA 2009 provides for a penalty where a person fails to make or deliver a return on or before the filing date.

6. The Appellant's return for the tax period ending 5 May 2017 was not filed on time and a penalty of £100 was imposed under paragraph 8 of Schedule 55.

Reasonable excuse

7. Paragraph 23 of Schedule 55 FA 2009, provides that a penalty does not arise in relation to a failure to make a return if the person satisfies HMRC (or on appeal, a Tribunal) that they had a reasonable excuse for the failure and they put right the failure without unreasonable delay after the excuse ceased.

8. The law specifies two situations that are not reasonable excuse:

(a) An insufficiency of funds, unless attributable to events outside the Appellant's control, and

(b) Reliance on another person to do anything, unless the person took reasonable care to avoid the failure.

9. There is no statutory definition of "reasonable excuse". Whether or not a person had a reasonable excuse is an objective test and "is a matter to be considered in the light of all the circumstances of the particular case" (*Rowland V HMRC* (2006) STC (SCD) 536 at paragraph 18).

10. The actions of the taxpayer should be considered from the perspective of a prudent person, exercising reasonable foresight and due diligence, having proper regard for their responsibilities under the Tax Acts. The decision depends upon the particular circumstances in which the failure occurred and the particular circumstances and abilities of the person who failed to file their return on time. The test is to determine what a reasonable taxpayer, in the position of the taxpayer, would have done in those circumstances and by reference to that test to determine whether the conduct of the taxpayer can be regarded as conforming to that standard.

The background facts

11. The Appellant registered as a Contractor with HMRC on 15 December 2015.

12. For the tax period ending 5 May 2017 a contractor's monthly return was due by 19 May 2017.
13. The return was filed three days late.
14. HMRC imposed a fixed penalty of £100.
15. The Appellant appealed to the Tribunal on 20 October 2020.

PERMISSION TO APPEAL OUT OF TIME

16. The appellant's appeal to HMRC under s31A TMA 1970 was made outside the statutory deadline in relation to the tax period ending 5 May 2017. HMRC refused consent under s49(2)(a) of TMA 1970. For the following reasons, I have decided not to give permission for the appeal to be notified late:

17. The relevant penalty notice was dated 27 May 2017. It was sent to the Appellant's registered correspondence address. Therefore the time limit for appealing expired on 26 June 2017. The appeal was not submitted until September 2020 and is therefore over three years late. Such a delay is plainly serious and significant.

18. Mr Averill has not indicated why he did not appeal within the time limit. There is no suggestion that he did not receive the penalty notice and the notice was not returned marked undelivered. I therefore conclude that he had the notice which clearly details the date by which an appeal must be made. I further find that there is no good explanation for the delay.

19. The consequences to either party of an extension of time limits must be considered in light of my assessments of the merits of the substantive appeal. The Respondent is entitled to some finality in properly administering the CIS tax regime and the time limits have been imposed by statute to provide that finality. The Appellant would be prejudiced by a refusal to extend the time limits, however, he has offered no good explanation for his delay in appealing, and I do not consider that the explanation given for his late filing of his return constitutes a reasonable excuse for either delay.

20. In considering the application for permission to appeal out of time, pursuant to *Data Select Ltd v HMRC [2012] UKUT 187 (TCC)* I have considered:

- a) The length of the delay;
- b) Whether there is a good explanation for that delay;
- c) The consequences of permission to appeal;
- d) The consequences of refusal of permission.

21. In the circumstance I do not consider that the appellant has a good explanation for his delay which is of some length. In balancing the prejudice caused to both parties, I conclude that it would be inappropriate to extend the time limit for appeal, and the application for permission to appeal out of time is refused.

The Appellant's case

22. The Appellant's grounds of appeal are that he is no longer a contractor as of 6 November 2017.

HMRC's Case

23. A late filing penalty is raised solely because a return is filed late in accordance with Schedule 55 FA 2009.

24. Where a return is filed after the relevant deadline a penalty is charged.

25. The onus lies with HMRC to show that the penalties were issued correctly and within legislation. If the Tribunal find that HMRC have issued the penalties correctly the onus then reverts to the Appellant to show that he has a reasonable excuse for the late filing of his return.

Reasonable Excuse

26. Under Paragraph 23 (1) Schedule 55 FA 2009 liability to a penalty does not arise in relation to failure to make a return if the taxpayer has a reasonable excuse for failure.

27. ‘Reasonable excuse’ was considered in the case of *The Clean Car Company Ltd v The Commissioners of Customs & Excise* by Judge Medd who said:

“It has been said before in cases arising from default surcharges that the test of whether or not there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?” [Page 142 3rd line et seq.].

28. HMRC considers a reasonable excuse to be something that stops a person from meeting a tax obligation on time despite them having taken reasonable care to meet that obligation. HMRC’s view is that the test is to consider what a reasonable person, who wanted to comply with their tax obligations, would have done in the same circumstances and decide if the actions of that person met that standard.

29. If there is a reasonable excuse it must exist throughout the failure period.

30. The Appellant has not provided a reasonable excuse for his failure to file his CIS return for the tax period ending 5 May 2017 on time and accordingly the penalty has been correctly charged in accordance with the legislation.

31. The amount of the penalties charged is set within the legislation. HMRC has no discretion over the amount charged and must act in accordance with the legislation. By not applying legislation and as such not to have imposed the penalty would mean that HMRC was not adhering to its own legal obligations.

Special Reduction

32. Paragraph 16(1) of Schedule 55 allows HMRC to reduce a penalty if they think it is right because of special circumstances. “Special circumstances” is undefined save that, under paragraph 16(2), it does not include ability to pay, or the fact that a potential loss of revenue from one taxpayer is balanced by a potential overpayment by another.

33. In other contexts “special” has been held to mean ‘exceptional, abnormal or unusual’ (*Crabtree v Hinchcliffe* [1971] 3 All ER 967), or ‘something out of the ordinary run of events’ (*Clarks of Hove Ltd v Bakers’ Union* [1979] 1 All ER 152). The special circumstances must also apply to the particular individual and not be general circumstances that apply to many taxpayers by virtue of the penalty legislation (*David Collis* [2011] UKFTT 588 (TC), paragraph 40).

34. Where a person appeals against the amount of a penalty, paragraph 22(2) and (3) of Schedule 55, FA 2009 provide the Tribunal with the power to substitute HMRC’s decision with another decision that HMRC had the power to make. The Tribunal may rely on paragraph 16 (Special Reduction) but only if they think HMRC’s decision was ‘flawed when considered in the light of the principles applicable in proceedings for judicial review’.

35. HMRC have considered the Appellant's grounds of appeal but assert that the Appellant's circumstances do not amount to special circumstances which would merit a reduction of the penalties.

36. Accordingly, HMRC's decision not to reduce the penalties under paragraph 16 was not flawed. There are no special circumstances which would require the Tribunal to reduce the penalties.

FINDINGS OF FACT

37. The Appellant set up an account under the new CIS scheme on 3 November 2017. Until the month ending 5 November 2017 the Appellant was therefore required to submit monthly returns under the previous scheme.

38. Paul Averill filed his CIS return on 22 May 2017. It was due to be filed by 19 May 2017. It was therefore three days late.

39. On or around 27 May 2017 a penalty notice was issued to 72 Northbourne Avenue, BH10 6DQ. There is no suggestion throughout the evidence provided to me that the Appellant did not receive the penalty notice. I have seen no evidence of postal difficulties at the relevant time, and no documentation has been returned to the Respondent marked undeliverable. I find therefore that the penalty notice was properly issued and received by Mr Averill.

40. A person is liable to a penalty if (and only if) HMRC give notice to the person specifying the date from which the penalty is payable. I am satisfied that the penalty notices dated on or around 27 May 2017 were sent to the Appellant's correspondence address at 72 Northbourne Avenue (*Donaldson v The Commissioners for HM Revenue & Customs* [2016] EWCA Civ 761).

41. Nil returns were submitted in 2020.

DISCUSSION

42. When a person appeals against a penalty they are required to have a reasonable excuse which existed for the whole period of the default. There is no definition in law of reasonable excuse, which is a matter to be considered in the light of all the circumstances of the particular case. A reasonable excuse is normally an unexpected or unusual event, which prevents him or her from complying with an obligation which otherwise they would have complied with.

43. I have concluded that the CIS return for period ending 5 May 2017 was not submitted on time. It should have been submitted by 19 May 2017. Subject to considerations of "reasonable excuse" and "special circumstances" set out below, the penalties imposed are due and have been calculated correctly.

44. It is not clear to me what the relevance of the registration of a new account in November 2017 is, or the relevance of nil returns in 2020. It is not disputed that a return was due by 19 May 2017 and that it was not filed until 22 May 2017. No explanation has been offered as to why this return – in May 2017 – was filed late. The fact that there were changes to the account several months or years later cannot have had a causative effect on the failure to file.

45. The Appellant had no reasonable excuse in respect of the late filing of an CIS return for the period ending 5 May 2017.

46. Even when a taxpayer is unable to establish that he has a reasonable excuse and he remains liable for one or more penalties, HMRC have the discretion to reduce those penalties if they consider that the circumstances are such that reduction would be appropriate. In this case HMRC have declined to exercise that discretion.

47. Paragraph 22 of Schedule 55 provides that I am only able to interfere with HMRC's decision on special reduction if I consider that their decision was flawed (in the sense understood in a claim for judicial review). That is a high test and I do not consider that HMRC's decision in this case (set out in their Statement of Case) is flawed. Therefore, I have no power to interfere with HMRC's decision not to reduce the penalties imposed upon Paul Averill.

CONCLUSION

48. I therefore confirm the fixed penalty of £100.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

49. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**ABIGAIL HUDSON
TRIBUNAL JUDGE**

Release date: 1 July 2021

APPENDIX
RELEVANT STATUTORY PROVISIONS

Finance Act 2009

50. The penalties at issue in this appeal are imposed by Schedule 55.

Paragraph 1(1):

A penalty is payable by a person (“P”) where P fails to make or deliver a return, or to deliver any other document, specified in the Table below on or before the filing date.

Paragraph 8:

P is liable to a penalty under this paragraph of £100.

51. Paragraph 23 of Schedule 55 contains a defence of “reasonable excuse” as follows:

23—

(1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a return if P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure.

(2) For the purposes of sub-paragraph (1)—

(a) an insufficiency of funds is not a reasonable excuse, unless attributable to events outside P's control,

(b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, and

(c) where P had a reasonable excuse for the failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.

52. Paragraph 16 of Schedule 55 gives HMRC power to reduce penalties owing to the presence of “special circumstances” as follows:

16—

(1) If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule.

(2) In sub-paragraph (1) “special circumstances” does not include—

(a) ability to pay, or

(b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

(3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to—

(a) staying a penalty, and

(b) agreeing a compromise in relation to proceedings for a penalty.

53. Paragraph 20 of Schedule 55 gives a taxpayer a right of appeal to the Tribunal and paragraph 22 of Schedule 55 sets out the scope of the Tribunal's jurisdiction on such an appeal. In particular, the Tribunal has only a limited jurisdiction on the question of "special circumstances" as set out below:

22—

- (1) On an appeal under paragraph 20(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.
- (2) On an appeal under paragraph 20(2) that is notified to the tribunal, the tribunal may —
 - (a) affirm HMRC's decision, or
 - (b) substitute for HMRC's decision another decision that HMRC had power to make.
- (3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 16—
 - (a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or
 - (b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 16 was flawed.
- (4) In sub-paragraph (3)(b) "flawed" means flawed when considered in the light of the principles applicable in proceedings for judicial review.